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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 258

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, a corporation,

Petitioner,

vs.

CLIFFORD BARNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Text Cited

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Staten Island Rapid Transit Railway Company, a corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cause on April 8, 1963.

Citations to Opinions Below

The opinion of the Court of Appeals, printed in Appendix A hereto, is reported at 316 F. 2d 38.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 8, 1963 (Appendix B hereto). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Question Presented

1. Since the *Safety Appliance Act*, 45 U.S.C. §1 *et seq.* does not create a private right of action for damages, and is silent as to its application to State created causes of action involving a violation of its terms, is not the *Safety Appliance Act*, in such a State created action, to be applied in the same manner in which the applicable State law applies its penal or regulatory statutes to private damage actions?

Statutes Involved

The statutory provisions whose mention is necessary to a resolution of the problem posed by this petition are the *Federal Safety Appliance Act*, 45 U.S.C. §1 *et seq.* and the *Federal Employers' Liability Act*, 45 U.S.C. §51 *et seq.*

Statement*

This case was brought in the Superior Court of New Jersey by Clifford Barney who sought damages arising out of personal injuries from petitioner, Staten Island Rapid Transit Railway Company (hereinafter denominated as "Railway"). The matter was removed to the United States

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* References are to the certified copy of the record below which has been filed in this Court and consists of the Appendix filed in the Court below by petitioner, Staten Island Rapid Transit Railway Company and the Appendix filed thereby respondent, Clifford Barney. References to the Appendix filed below by the present petitioner contain the prefix "P" and references to the Appendix filed below by the present respondent contain the prefix "R".

District Court for the District of New Jersey upon the ground of diversity of citizenship and, after trial before the Hon. Reynier J. Wortendyke, Jr., and a jury, a verdict in favor of the Railway was returned and judgment was entered thereon (R132a). The United States Court of Appeals for the Third Circuit reversed and ordered a new trial. *Barney v. Staten Island Rapid Transit Railway Company*, 316 F. 2d 38 (3rd Cir. 1963).[1] Railway now seeks *certiorari* under 28 U.S.C. §1254(1) to review the judgment of the Court of Appeals (Appendix B hereto).

Clifford Barney was an employee of Boyle Midway, Inc. of Cranford, New Jersey (R65a), upon whose premises Railway had spotted a tank car (R48a). The car had a dome lid on the top center thereof and a catwalk running along the side of the car (R35a). Above the catwalk and parallel with the side of the car was a grab rail (R71a; R36a). The dome lid was reached by a ladder which ran from the catwalk to the dome lid and which curved parallel to the curvature of the exterior of the tank (R35a).

The grab rail ran through and past the ladder and was fastened to the uprights of the ladder (R87a; R89a; R90a). When Clifford Barney was upon the ladder, the grab rail broke at a point about 20 inches from one of the uprights (P36a). This caused the ladder to spring away from the body of the tank and this, in turn, caused Clifford Barney to fall (R69a). The ladder itself did not break (R76a).

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[1] Clifford Barney also brought action in the Superior Court of New Jersey against John H. Grace Company, owner of the tank car in question, and Hunt Manufacturing Company, lessee of the car. This action was removed on diversity grounds and was consolidated for trial with the case against Railway. John H. Grace Company and Hunt Manufacturing Company each received a favorable verdict and judgment in the District Court and the judgments in their favor were affirmed by the Court of Appeals, 316 F. 2d at 38. (Appendix A hereto) and they are not involved in this petition.

At the point where the break occurred two of the pieces of pipe which formed the grab rail had been joined by a pipe union (R36a). There was a clear, white metal break which extended one-quarter inch inside the union (P37a). The break occurred flush with the nut inside the collar of the union (P7b) and the union had been properly put on (P8b).

At the trial, plaintiff argued that the separation of the grab rail constituted a violation of the *Safety Appliance Act*, 45 U.S.C. §1 *et seq.*, entitling him to a directed verdict on the question of Railway's liability (R94a; P11b *et seq.*). At the same time plaintiff conceded that contributory negligence, if shown, would constitute a valid defense to the claim asserted by him (P44a). Railway argued (P11b *et seq.*) and submitted appropriate requests to charge (R128a; R129a) that it was not liable for the proven violation of the *Safety Appliance Act* unless its violation was a negligent one. Specifically, it was Railway's argument that under the law of New Jersey, which concededly alone gave rise to plaintiff's cause of action, it was not liable in tort for the consequences of a violation of a penal or regulatory statute, unless the violation of that statute had been a negligent one. More specifically, Railway argued that it was not liable for the violation of the *Safety Appliance Act* shown by plaintiff, unless the defect that constituted the violation could have been discovered by it prior to the accident in the course of a reasonable inspection of the car. The District Court charged the jury in accord with the principles argued by Railway (R121a; R128a; R129a), and its charge was in accord with the New Jersey application of penal or regulatory statutes to civil actions seeking to impost tort liability.

Reasons for Granting the Writ

This case raises a novel issue, not yet passed upon by this Court, involving the application of federal regulatory or penal statutes within the context of a state created right of action. A brief sketch of the pertinent legal history is necessary to an understanding of the issue presented.

It is now settled that the *Safety Appliance Act*, 45 U. S. C., §1, *et seq.* is itself only a penal or regulatory statute and it does not confer a private right of action in favor of those injured because of a violation of its terms. *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205 (1934). It thus follows that a suit not involving the *Federal Employers' Liability Act*, 45 U. S. C., §51, *et seq.*, but which is predicated upon a violation of the *Safety Appliance Act*, states a cause of action arising under the law of the State in which the injury occurred and is not a case which may be brought in a Federal Court in the absence of diversity of citizenship. *Moore* v. *C. & O. Ry. Co.*, *supra*. A full discussion of all pertinent cases and principles to sustain the above may be found in *Jacobson* v. *New York, N. H. & Hr. Co.*, 206 F. 2d 153 (1st Cir. 1953), cert. granted in part 346 U. S. 895 (1953), affirmed *per curiam* 347 U. S. 909 (1954). State law doctrines of contributory negligence, proximate cause and last clear chance all may play a significant part where recovery is sought by one not entitled to sue under the *Federal Employers' Liability Act* because of a violation of the *Safety Appliance Act*. *Fairport R. Co.* v. *Meredith*, 292 U. S. 589 (1934); *Jacobson* v. *New York, N. H. & Hr. Co.*, *supra*, 206 F. 2d at 157.

In actions brought under the *Federal Employers' Liability Act*, this Court has said that a violation of the *Safety Appliance Act* resulting in injury to a railroad employee will result in absolute liability despite a showing of the highest degree of care exercised by the railroad.

O'Donnell v. *Elgin, Joliette & Eastern Ry. Co.*, 338 U. S. 384 (1949). It is clear, however, that the source of its absolute liability is not the *Safety Appliance Act*, but that it is a result of the application of the terms of the *Federal Employers' Liability Act*, 45 U. S. C., §51. *Urie* v. *Thompson*, 337 U. S. 163, 188-189 (1949); *San Antonio Ry* v. *Wagner*, 241 U. S. 476 (1916). The *Safety Appliance Act* standing alone makes no mention of the mechanics of the application of its terms to suits against carriers brought by non-employees. As shown above, such actions arise under state law.

Petitioner contends that in view of this silence of the *Safety Appliance Act* the principles by which it is to be applied to a state created cause of action such as this are those prevailing under the applicable state law[1] which in this case is that of New Jersey.

Rooted deep in New Jersey's legal history is the principle that tort liability does not follow the violation of a statutory command unless the violation has been a negligent one. *Carlo* v. *The Okonite-Callender Cable Co.*, 3 N. J. 253, 69 A. 2d 734 (1949); *Michaels* v. *Brookchester, Inc.*, 26 N. J. 379, 140 A. 2d 199 (1960); *Michaels* v. *Brunton*, 7 N. J. 102, 80 A. 2d 547 (1951); *Evers* v. *Davis*, 86 N. J. L. 196, 90 A. 637 (E. & A. 1914). Under these cases it is held that the statute defines the standard of conduct to be obeyed, but a tort action in New Jersey nontheless remains

[1] No issue is raised concerning New Jersey's power to ignore the Safety Appliance Act in a case such as this for petitioner concedes that New Jersey would apply the Safety Appliance Act in an action in tort to provide a standard of conduct by which the actions of a defendant railroad might be measured.

a negligence action and if the defendant did not carelessly violate the statute no civil liability attaches to its breach.[2]

Under the four cases cited immediately above there can be no doubt that the District Court was correct as a matter of New Jersey law in charging the jury that defendant Railway was not liable unless the defect which led to Clifford Barney's injury could have been discovered by it in the course of a reasonably careful inspection of the car. Many common law courts agree with New Jersey's position concerning application of penal or regulatory statutes to tort actions and other courts disagree holding that a statutory violation constitutes "negligence *per se*". See 38 *Am. Jur.*, "*Negligence*", §158, p. 827.

Thus, it will be seen that where the statute in question does not create a private right of action, as is the case with the *Safety Appliance Act* with respect to suits by non-employees against railroads, the principles governing application of the statute to a private tort action remain to be governed by the common law.

It was against this background that the Court of Appeals held that Railway was absolutely liable to Clifford Barney. In so doing, the Court of Appeals ignored New Jersey's common law and in fact created Federal Common Law in direct violation of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny. We submit that this action of the Court of Appeals constituted an unconstitutional interference with New Jersey's right to be the sole judge of the terms which will govern causes of action created by its law.

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[2] It is true, as the Court of Appeals pointed out, 316 F. 2d at 41, that New Jersey will impose absolute liability where there is a clear legislative intent to do so, but New Jersey Courts are reluctant to find such an intent unless there is an explicit legislative direction. *Carlo v. The Okonite-Callender Cable Co., supra.*

The Court of Appeals relied heavily on *Shields* v. *Atlantic Coastline R. Co.*, 350 U. S. 318 (1956), but that case did not involve the issue now raised. It was not mentioned in the Court of Appeal's opinion in that case, *Atlantic Coastline Railroad Co.* v. *Shields*, 220 F. 2d 242 (5th Cir. 1955) nor was it mentioned in this court's opinion. The issue now tendered was not even remotely mentioned in the briefs filed in this court in the *Shields* case. We also point out that in many similar matters the issue now tendered may be moot because if the failure of a safety appliance takes place in a jurisdiction that treats a statutory violation as negligence *per se*, the source of power for the imposition of absolute liability need not be questioned.

Thus, petitioner submits that in view of the silence of the Safety Appliance Act as to the principles by which it is to be applied to this state created cause of action those principles remain governed by New Jersey's common law. In applying the *Safety Appliance Act* in a manner contrary to the clear common law doctrines prevailing in New Jersey, the Court of Appeals has in fact indulged in the creation of state common law contrary to the dictates of *Erie R. Co.* v. *Tompkins, supra.*[3]

We believe that this case, therefore, raises a substantial and novel issue[4] regarding the scope and application of the *Safety Appliance Act* and the interplay of Federal and State law. We submit that these issues clearly merit the

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[3] It is relevant to point out that this Court most recently held that a private right of action was not to be implied from the existence of federal statutes. *Wheeldin* v. *Wheeler*, —— U. S. —— (June 3, 1963).

[4] The issue now tendered was not raised in *Shields* v. *Atlantic Coastline R. Co.*, *supra*, was not discussed in that case and was, therefore, not decided. Under these circumstances, petitioner submits that *Shields* cannot be deemed controlling.

attention of this Court. We hardly need mention that the decision of the Court below has radiations far beyond this particular case and also far beyond this particular type of case for many federal laws impose duties whose breach can become the subject matter of a state created right of action for damages. In such circumstances, the Courts of the various states are entitled to know whether these federal statutes may be applied in accord with the state law creating the right of action or whether in each instance they are required to search for some expression of federal policy, however remote it may be.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

H. CURTIS MEANOR,
Counsel for Petitioner.

[APPENDICES FOLLOW].

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14,043 and 14,044

CLIFFORD BARNEY (PLAINTIFF),
Appellant in No. 14,043

v.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, A CORPORATION (DEFENDANT)

CLIFFORD BARNEY (PLAINTIFF)

v.

JOHN H. GRACE COMPANY
Appellant in No. 14,044

AND HUNT MANUFACTURING COMPANY,
(DEFENDANTS)

HUNT MANUFACTURING COMPANY.
(3D PARTY PLAINTIFF)

v.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, A CORPORATION (3D PARTY DEFENDANT)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 6, 1962

Before BIGGS, *Chief Judge*, and STALEY, *Circuit Judge*, and LEAHY, *District Judge*.

Appendix A

Opinion of the Court

(Filed—April 8, 1963)

By STALEY, *Circuit Judge*.

These are appeals from a judgment of the district court entered upon a jury verdict in favor of the defendants in a personal injury action brought by the plaintiff Clifford Barney. Barney appeals from that judgment and defendant, John H. Grace Company, cross appeals from the denial of its motion to dismiss the complaint as to it on the grounds of lack of jurisdiction.

Plaintiff, an employee of Boyle-Midway, Inc., of Cranford, New Jersey, was injured while climbing upon a railroad tank car for the purpose of obtaining a sample of pine oil prior to unloading the oil. His employer was the consignee of the car which had been shipped by Hunt Manufacturing Company of Cleveland, Ohio, through the facilities of various railroads to the consignee's siding at Cranford. The car had been leased to Hunt by Grace, an Illinois partnership.

The uncontroverted evidence establishes that Barney was ascending the ladder which lead to the dome of the car when he fell, suffering the injuries for which suit was brought. He testified that he had taken two or three steps when the ladder sprang back, causing him to fall to the ground. A fellow employee testified that after the accident he observed a break in the safety railing about twenty inches to the left of the ladder. The safety railing was bracketed to the inner side of the ladder. It was plaintiff's theory that the break in the railing caused the ladder to which it was attached to swing out, thereby throwing him to the ground.

Appendix A

Two suits, one against the Staten Island Rapid Transit Railway Company ("railroad"), which had brought the car to the siding, and the other against Grace and Hunt, were brought in a New Jersey state court. They were transferred to the district court on the basis of diversity jurisdiction and the provisions of 28 U. S. C. § 1441, and were consolidated for trial. At the pretrial hearing it was noted that the plaintiff was relying on the Safety Appliance Act, 45 U. S. C. A. §§ 1-46, as to his cause of action against the railroad. Nevertheless, the district court instructed the jury that a violation of the Act would only be evidence of negligence, and the railroad would not be liable unless the defective safety appliance could have been ascertained by a reasonable inspection. It is this instruction which Barney challenges in this court, contending that the district court should either have directed a verdict against the railroad or charged that the Act gave rise to absolute liability.

More particularly, the plaintiff concedes that, because his cause of action is based on diversity, the substantive law of New Jersey, including that pertaining to contributory negligence, is applicable. See Fairport, Painesville & Eastern Railroad Co. v. Meredith, 292 U. S. 589 (1934). However, he asserts that the Safety Appliance Act defines the standard of care required of the railroad in the circumstances of this case, and that liability for a violation of the Act is absolute in the absence of any evidence that plaintiff was contributorily negligent. It is contended that no evidence of contributory negligence was adduced to present a jury question.

It can no longer be said that only railroad employees are within the protection of the Safety Appliance Act. Shields v. Atlantic Coast Line Railroad Co., 250 U. S. 318 (1956); Mazzucola v. Pennsylvania Railroad Co., 281 F. 2d

267 (C. A. 3, 1960). Indeed, it is conceded that plaintiff is a member of a class of persons for whose benefit the statute was enacted. But the railroad argues that the absolute liability resulting from a violation of the Act and a showing of causation obtains only when suit is brought by an employee under the Federal Employers Liability Act, 45 U. S. C. A. §§ 51-60. It is asserted that when jurisdiction is based on diversity of citizenship the common law of the state where the accident occurs is fully applicable. The railroad concedes that New Jersey would apply the Safety Appliance Act as an appropriate standard of conduct, but urges that under the law of that state a statutory violation does not give rise to civil liability unless the violation has been a negligent one.

A similar argument was advanced in O'Donnell v. Elgin, Joliet & Eastern Railway Co., 338 U. S. 384 (1949), but was rejected. The Supreme Court noted that some states treat a satutory violation as some evidence of negligence, while others refer to it as prima facie evidence of negligence or as giving rise to the doctrine of res ipsa loquitur. But Mr. Justice Jackson noted that the Court "early swept all issues of negligence out of cases under the Safety Appliance Act." 338 U. S. at 390. It is true that suit in that case was brought by an employee under the FELA. Subsequently, however, in deciding Shields v. Atlantic Coast Line Railroad Co., the Court said, 350 U. S. at 325:

> "There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. Having been upon the dome running board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. *As to him, the violation of the statute must therefore result in absolute liability.* * * *" (Emphasis supplied.)

This unqualified language would appear to eviscerate the railroad's argument in the case at bar.[1]

Moreover, an analysis of the relevant cases convinces us that New Jersey will impose absolute liability for a statutory violation proximately resulting in injury if there is a clear legislative intent to do so. Carlos v. Okonite-Callender Cable Co., 3 N. J. 253, 69 A. 2d 734 (1949);[2] McBride v. Maryland Casualty Co., 128 N. J. L. 64, 23 A. 2d 596 (1942). That Congress intended to prescribe such liability on behalf of those within the protection of the Safety Appliance Act is manifest from the *O'Donnell* and *Shields* cases, among others.

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[1] The precise basis for federal jurisdiction in *Shields* is not discussed either in the opinion of the Fifth Circuit, Atlantic Coast Line Railroad Co. v. Shields, 220 F. 2d 242 (C. A. 5, 1955), or that of the Supreme Court, while the opinion of the district court is not reported. Nor is the question mentioned in the briefs filed in the Supreme Court. Since the petitioner was not a railroad employee, jurisdiction did not rest upon the FELA. Because of this, coupled with the fact that the Safety Appliance Act does not purport to confer a right of action upon anyone, Urie v. Thompson, 337 U. S. 163, 188 (1949); Jacobson v. New York, N. H. & H. Railroad Co., 206 F. 2d 153 (1953), aff'd per curiam, 347 U. S. 909 (1954), we assume that jurisdiction was premised upon diversity of citizenship.

[2] Although the court refused to impose absolute liability in that case, it indicated that it would have done so had there been a clear legislative intent to that effect. The other cases cited by the railroad, Michaels v. Brookchester, Inc., 26 N. J. 379, 140 A. 2d 199 (1958); Daniels v. Brunton, 7 N. J. 102, 80 A. 2d 547 (1951); and Evers v. Davis, 86 N. J. L. 196, 90 Atl. 677 (1914), are distinguishable on the same basis. That is, in none of them was the pertinent statute construed as manifesting a legislative intent to impose absolute civil liability in favor of one injured by a violation of it.

Appendix A

The railroad places great reliance on Jacobson v. New York, N. H. & H. Railroad Co., 206 F. 2d 153 (C. A. 1, 1953), aff'd per curiam, 347 U. S. 909 (1954). However, the issue in that case was whether, in the absence of federal jurisdiction based on diversity of citizenship, there is federal-question jurisdiction of a suit by one not an FELA employee whose claim is premised on the Safety Appliance Act. Since that Act does not purport to confer a right of action, the question was answered in the negative.

The railroad next argues that the Safety Appliance Act is not applicable because the tank car was not being hauld or used on its line at the time of the accident.[3] It is asserted that the siding upon which the car was resting was owned by Barney's employer. The argument is without merit. Boyle-Midway's ownership of the siding is not significant, for it was the railroad which spotted the car at that point and removed it after the unloading operation. There is no evidence that anyone other than the railroad had control of the spotting and removal operation. To exclude a carrier from the provisions of the statute in these circumstances would be to emaseulate its protective purpose. Rodgers v. Conemaugh & Black Lick Railroad Co., 137 F. Supp. 467 (W. D. Pa., 1956).

The railroads reliance on Patton v. Baltimore & Ohio Railroad Co., 197 F. 2d 732 (C. A. 3, 1952), is misplaced.

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[3]The relevant portion of the Safety Appliance Act provides:

"§11. Safety appliances required for each car, when hand brakes may be omitted.

"It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections. * * *." 45 U.S.C.A. §11.

The issue there was which of two carriers would be responsible for a violation of the statute. We specifically distinguished cases, like this, in which only one railroad system is involved.

It is argued that if the Safety Appliance Act is construed as imposing absolute liability, Barney's claim under it, first asserted at the pretrial conference more than two years after his injury, is barred by the New Jersey statute of limitations. The argument is not tenable. The complaint specifically averred that the defective and unsafe condition of the tank car's ladder and handrail was the cause of the accident. Thus, the railroad was early put on notice as to the defect upon which Barney would rely. By invoking the Safety Appliance Act at pretrial the plaintiff simply averred another manifestation of the condition referred to in the complaint. Puterman v. Pennsylvania Railroad Co., 148 F. Supp. 428 (E. D. N. Y., 1957); see also Oelfke v. Hudson & M. R. Co., 5 N. J. M. 2; 135 Atl. 659 (1926). The railroad itself rightfully contends that the statute does not purport to confer a right of action. Hence, it is difficult to see how Barney's reliance upon it can be said to have given rise to a new cause of action.

We now turn to the question of contributory negligence. As previously indicated, Barney concedes that this defense was available to the railroad. He contends, however, that the submission of this issue to the jury was improper because there was no evidence to support it. This submission is said to have been prejudicial not only to his cause against the railroad, but also to his common law negligence claim against the other defendants, Grace and Hunt.

The argument is not well taken. The plaintiff failed to specifically object to the charge on contributory negli-

gence as required by Rule 51, Fed. R. Civ. P.[4] Indeed, there was no objection to the main charge on this point. The plaintiff merely objected generally to the requests to charge which had been submitted by the various defendants.[5] Though these requests were incorporated in the

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[4] "Rule 51. Instructions to Jury: Objection

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." 28 U.S.C.A., Rules of Civil Procedure, Rule 51.

[5] After the charge of the court, counsel made the following objection:

> "Mr. Seaman: We object to Hunt's requests to charge No. 7 and 8, and the charge requested by Staten Island and charges 1, 2, 5, 10, 11, 16. We object in the main charge to the form of the description of the duty and opportunity owed by Grace Company and by the Staten Island Railroad. That's all."

The requests pertinent to the issue of contributory negligence were Hunt's Nos. 7 and 8, and Staten Island's No. 11. They are:

Hunt's No. 7:

> "Should you find that the defendant was guilty of negligence, but that the negligence of the plaintiff contributed to the happening of the accident then you must bring a verdict for the defendant regardless of how slig t the contributory negligence of the plaintiff might have been."

(Continued on following page)

court's instructions following its main charge, even as to them counsel failed to state the grounds of his objection. His failure to do so is particularly significant in view of co-counsel's prior observation, after the conclusion of plaintiff's own case in chief that the issue of contributory negligence was for the jury." Thus, the plaintiff did not comply with either the letter or spirit of Rule 51, and is precluded from raising this issue on appeal. Cf. Hargrave,

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(Continued from preceding page)

Hunt's No. 8:

"One who sees or could have seen if he had looked, and has the faculties to understand the dangers to which he is exposed, is charged with a knowledge of them; and his failure to act on the knowledge as a prudent and cautious man would act under like circumstances is negligence which will defeat recovery."

Staten Island's No. 11:

"At the time of the accident, the plaintiff was under a duty to exercise that degree of care and caution that would be exercised under the same or similar circumstances by a reasonably prudent person. If you find that the plaintiff failed to exercise the degree of care required, and that such failure was a contributing proximate cause of the accident, then you must find the plaintiff guilty of contributory negligence and you must return a verdict for the defendant of no cause for action."

"The following is a portion of the colloquy during the argument on Staten Island's motion to dismiss the complaint:

"Mr. Linett: I believe, your Honor, the Court may reasonably take the evidence most favorable to the plaintiff to show that he was injured when he climbed up on this ladder and the safety railing broke causing him to fall back.

"The Court: We must take his theory of the case.

"Mr. Linett: The evidence will support it. As far as contributory negligence, I certainly think that is a question for the jury.

"The Court: And I so ruled."

v. Wellman, 276 F. 2d 948, 950 (C. A. 9, 1960); American Fidelity & Casualty Co. v. Drexler, 220 F. 2d 930, 934-935 (C. A. 5, 1955); Dostal v. Baltimore & Ohio Railroad Co., 189 F. 2d 352, 356 (C. A. 3, 1951).

We find no merit to plaintiff's contention that the district court committed reversible error in admitting a photograph of the tank car into evidence because there was no testimony that it represented the condition of the car at the time of the accident. Of course, the admission of a photograph into evidence is largely within the discretion of the trial judge. The witness, Stanley D. Grace, verified that it was an authentic reproduction of the car in question. When asked by the court as of what time the photograph represented the car, he replied that it would be any time from 1954 to the date of the trial. On the basis of this authentication, the district court did not abuse its discretion in admitting it into evidence although it did not depict the break in the handrail.

Our conclusion with respect to the applicability of the Safety Appliance Act to Barney's claim against the railroad requires that the judgment as to it be reversed and the cause remanded for a new trial. However, Barney's suit against Hunt and Grace was premised on common law negligence. Because we find no error in this aspect of the case, the judgment in their favor will be affirmed. Thus, we need not decide the issue raised by Grace that plaintiff failed to obtain jurisdiction over it.

That portion of the judgment of the district court entered in favor of defendants John H. Grace Co. and Hunt Manufacturing Company will be affirmed; that portion of the judgment entered in favor of defendant Staten Island Rapid Transit Railway Company will be reversed and the cause remanded for a new trial.

LEAHY, *District Judge*, concurring.

I agree with the decision of this Court affirming the district court's judgment in favor of defendants' John H. Grace Co. and Hunt Manufacturing Company. I concur, too, with its judgment remanding the cause against the Staten Island Rapid Transit Company for a new trial—but only after some pause.

Staten Island is charged with violating the Federal Safety Appliance Act. That Act requires, *inter alia*, railroad cars engaged in interstate commerce to be furnished with prescribed safety equipment. Violation of the Act subjects an offending railroad to criminal penalties. Violation which is the proximate cause of an injury to a private party who, like Barney, was intended to be protected by the Act will ordinarily result in the application of strict or absolute liability being imposed upon the railroad. The legal problem posed by this case arises solely because this is a diversity case and thus fertile soil for that myriad of problems which inevitably bloom when federal courts sit as state courts, in limited fashion and for limited purposes. The majority of this Court lays heavy reliance on Shields v. Atlantic Coast Railroad Co., 350 U. S. 325, also a diversity case,[1] and one in which language of the Supreme Court gives apparent support for the proposition that whatever state practice New Jersey may follow with respect to the imposition of absolute liability for the non-negligent violation of its penal statutes, federal district courts sitting in New Jersey must apply absolute liability for non-negligent violation of this statute. I am less convinced than the majority that *Shields* [by itself] can be taken as dispositive of the present question. At no point in the lengthy

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[1] See n. 1, Majority Opinion, *supra*.

briefs filed before the Supreme Court in *Shields* (a case arising in Alabama) and, indeed, at no point in the decision of the Circuit Court or the Supreme Court in *Shields*, is any discussion found of Alabama law or of Erie v. Tompkins, 304 U. S. 64, or its accompanying train of problems. Whatever the reason for the omission, I cannot read *Shields* as eviscerating the railroad's argument here.

I would decide this case without too much reliance on *Shields* and without resolving the troublesome question of what New Jersey state law is with respect to the imposition of absolute liability in a case such as the present. In Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, Chief Justice Stone stated:

> "It is a familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie Railroad v. Tompkins, * * * There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law * * * *When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the fed-*

eral statute and policy, conflicting state law and policy must yield."[2] (Italics added.)

I think no more need be said. I concur with the majority.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[2] See, 317 U. S. 176; 1 Moore, Fed. Prac. §0.324.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14,043 and 14,044

CLIFFORD BARNEY (PLAINTIFF),
Appellant in No. 14,043

v.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, A CORPORATION (DEFENDANT)

CLIFFORD BARNEY (PLAINTIFF)

v.

JOHN H. GRACE COMPANY
Appellant in No. 14,044

AND HUNT MANUFACTURING COMPANY
(DEFENDANTS)

HUNT MANUFACTURING COMPANY
(3D PARTY PLAINTIFF)

v.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, A CORPORATION (3D PARTY DEFENDANT)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, *Chief Judge* and STALEY, *Circuit Judge*, and LEAHY, *District Judge*.

Appendix B

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the portion of the judgment entered February 2, 1962 of the said District Court entered in favor of defendants John H. Grace Company and Hunt Manufacturing Company in this case be, and the same is hereby affirmed with costs to John H. Grace Company; and that the portion of the judgment entered in favor of defendant, Staten Island Rapid Transit Railway Company, be, and the same is hereby reversed, with costs to Clifford Barney, and the cause remanded for a new trial.

By the Court,

STALEY
Circuit Judge

April 8, 1963